No. 11969

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWARD J. MCBRIDE, doing business as Continental Press Service,

Appellant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a corporation,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Statement of the Case.

This appeal is from an order [R. 97], made after answer and hearing on order to show cause, and upon findings [R. 78-97], vacating *ex parte* temporary orders restraining refusal to render, and directing restoration of, common carrier private line telegraph service which had been discontinued after notice by state law enforcing agencies to appellee that the service was being used to violate state laws [R. 20-22].

Summary of the Facts.

Appellant's summary is deficient in essential particulars. Statement showing the pertinent provisions of appellee's Tariffs filed with the Federal Communications Commission, appellant's contract for the service in question, and the facts as found by the District Court, is, therefore, necessary:

May 19, 1945, appellant, doing business as Continental Press Service, applied for lease of and was furnished appellee's common carrier private line telegraph facilities and service from Chicago, Illinois, to Seattle, Washington, via Los Angeles and San Francisco, California, and installed and thenceforward furnished such facilities and service [R. 83].

The regulations in appellee's Tariff No. 219 filed with the Federal Communications Commission required, and still require, that leased facilities may be employed only for the private use of "companies whose offices are connected to the circuits, their affiliated and subsidiary companies and their representatives" [R. 82], and that they "shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states through which the circuits pass or the equipment is located, and the telegraph company reserves the right to discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that the service is being supplied contrary to law" [R. 82].

Appellant's application for the leased facilities and service, which was accepted by appellee May 19, 1945, contained the following stipulation:

> "The undersigned requests The Western Union Telegraph Company to furnish, subject to and in

accordance with its lawful rates and regulations, the service described (including such modifications therein as may be ordered from time to time) * * *

"The undersigned agrees that the facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states where the equipment is located, and that the company may discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that the service is being supplied contrary to law" [R. 84].

The court found that appellant had exclusive control over the leased facilities [R. 86]; that appellee's only connection therewith was to keep them in operating order, and that appellee was not informed of the contents of any communication over or other use made of the leased facilities until it received the notices from California law enforcing agencies hereinafter mentioned [R. 87].

Long prior to, on, and after, March 4, 1948, and until the discontinuance complained of, the leased facilities included a "drop" with a Morse telegraph instrument at each of the following eight locations in California [R. 86]:

333 Montgomery Street, San Francisco;

1911 Edison Highway, Bakersfield;

181 Andreas Road, Palm Springs;

Room 211, Platt Building, San Bernardino;

362 D Street, San Bernardino;

208 West Eighth Street, Los Angeles;

615 North La Brea, Los Angeles;

919 Fourth Avenue, San Diego.

Each "drop" was so operated that any message initiated thereat could be and was immediately transmitted to all other drops on the leased line [R. 86].

March 4, 1948, the District Attorney and Sheriff of Kern County, California, and the Chief of Police of the City of Bakersfield, joined in written notice to appellee that the telegraph instrument and wire at the "drop" at 1911 Edison Highway, Bakersfield, California (being one of the drops in the leased facilities), were being used to "aid, assist, and carry on the business of illegal bookmaking" and to violate sections 182 and 337a[1] of the California Penal Code, and demanded that the "drop" be discontinued [R. 72-73, 89].

March 31, 1948, appellee received written notice from the Attorney General of California that the leased facilities at each of said eight addresses in California (including "615 North La Brea, Los Angeles," the place of business of appellant's customer, Consolidated Publishing Company [R. 13, 15, 19]) were, as indicated by the transcript of proceedings then pending before the California Public Utilities Commission, engaged in furnishing information to bookmakers in violation of section 337a of the Penal Code of California, and demanding that the service at said places be discontinued [R. 73-75, 89-90].

Appellee immediately informed appellant that it had received the respective notices and that it intended to

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[1]Section 182 of the California Penal Code denounces conspiracy to commit any crime;

Section 337a of said Code provides that any person "who engages in pool-selling or book-making, with or without writing, at any time or place" is punishable by imprisonment;

Section 659 of the same code provides that every person who aids another in the commission of a misdemeanor is guilty of a criminal offense.

comply with the demands therein made [R. 90]. Appellant did not challenge the truth of the statements made in the notices.

April 2, 1948, appellee, relying upon the truth of the notices from the law enforcing agencies, and pursuant to the above quoted regulations in its F. C. C. Tariff No. 219 and the stipulation in appellant's application, discontinued the service [R. 49, 91].

April 6, 1948, the California Public Utilities Commission, following its public investigation into the use of public utility communication facilities for illegal purposes referred to in the Attorney General's notice, announced its decision,[2] finding, among other things, that appellee's facilities leased to appellant, including "drops" at each of the eight addresses above specified [R. 59-60], were being used by appellant's customer, Consolidated Publishing Company, and other persons, for illegal purposes [R. 65, 91].

April 22, 1948, this action was commenced and the District Court made the *ex parte* orders which were later vacated [R. 20-22].

The complaint alleges, in effect, that the leased facilities and service had been discontinued "wrongfully and without just cause" [R. 9]. No mention is made in the complaint or in the supporting affidavits of the above quoted regulations in appellant's Tariffs filed with the Federal Communications Commission, or of the stipulation in appellant's application, or of the notices from the law enforcing agencies.

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[2]The decision appears at pages 56-71 of the record, and is referred to in the findings of the District Court for further particulars [R. 91].

No facts are stated showing any violation of Chapter 5, Title 47, of the United States Code (Federal Communications Act) which prevents appellant from receiving appellee's service by wire at the same charges or upon terms and conditions as favorable as those given by appellee for like service under similar conditions to any other person [R. 8-9, 96-97]. The court found that there were no such facts and that appellee has been at all times ready and willing to provide appellant with its leased telegraph facilities and service without discrimination [R. 92].

The court also found that no application has been made to the Federal Communications Commission to modify the regulations in said Tariff No. 219, revised page 8, or to the California Public Utilities Commission to modify its decision of April 6, 1948 [R. 92-93]; that there has been no application by the Attorney General of the United States or request by the Federal Communications Commission that this action be filed, and there is no allegation of failure by appellee to comply with, or that appellee has violated, any provision of the Federal Communications Act [R. 94]; that discontinuance of facilities and service leased to appellant was not arbitrary or without just cause, but was pursuant to and in reliance upon appellant's contract, the Tariff regulations and the notices from law enforcing agencies [R. 96]; that appellant is not entitled to the relief prayed for or to have the *ex parte* temporary orders continued in force, and that it is not entitled to maintain the action [R. 97].

May 5, 1948, the *ex parte* temporary restoration and restraining orders were vacated, and the request for preliminary injunction and order directing restoration of service was denied [R. 77-78, 97-98].

Appellee's Contentions.

I. Appellant expressly agreed that appellee could discontinue the leased wire telegraph service on receipt of notice from state law enforcing agencies that it was being used to violate the law.

II. Discontinuance of the leased telegraph service was expressly authorized by the regulations in appellee's Tariff No. 219, revised page 8, filed with the Federal Communications Commission.

III. Appellant's recourse is to the Federal Communications Commission, and not to the courts.

IV. Neither section 401 nor section 406 of the Federal Communications Act is applicable to this case.

V. The orders appealed from should be affirmed.

ARGUMENT.

I.

Appellant Expressly Agreed That Appellee Could Discontinue the Leased Wire Telegraph Service on Receipt of Notice From State Law Enforcing Agencies That It Was Being Used to Violate the Law.

Appellant's application for service was accepted by appellee on May 19, 1945, and the leased facilities were furnished accordingly. Among other things, the application provides:

> "The undersigned agrees that the facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states where the equipment is located, and that the company may discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that the service is being supplied contrary to law" [R. 84].

On March 4 and March 31, 1948, respectively, the state law enforcing agencies notified appellee that its leased facilities at the respective locations described in the notices were being used to aid bookmaking and to furnish information to bookmakers in violation of section 337a of the California Penal Code [R. 72-73, 73-75, 89-90].

It is, of course, elementary that one who has by contract or otherwise expressly authorized an act or course of

conduct, may not invoke equitable relief against the normal consequences thereof.[3]

It is also an undoubted principle that courts will not lend their aid to the doing of anything which is illegal or inconsistent with sound morals or public policy.[4]

The regulations in Tariff No. 219 provide that leased facilities "may be employed only for the *private* use of those companies whose offices are connected to the circuits, their affiliated and subsidiary companies and their representatives, and each such office shall transmit and receive its particular communications over the equipment installed therein" [R. 81-82]. The regulations thus contemplate complete control by the lessee of leased facilities and of all communications over them. The court found that appellant had such control [R. 86-87].

In accordance with the Tariff regulation positively forbidding use of the facilities "for any purpose or in any manner directly or indirectly in violation of any * * * law," and authorizing discontinuance thereof on notice from law enforcing agencies that they are "being supplied contrary to law," appellant expressly agreed that appellee's facilities under his exclusive control would not be used to

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[3]*Freeman v. Scherer* (Kan. 1916), 154 Pac. 1019; 1022;
Stewart v. Hovey (Kan. 1891), 26 Pac. 683;
Downs v. Board of Com'rs (Kan. 1892), 29 Pac. 1077;
Lester v. Sullivan (Ky. 1908), 107 S. W. 300, 301.

[4]*Marshall v. Baltimore and Ohio Railroad Company* (1853), 16 How. 314, 334;
Howard Sports Daily v. Weller (Md. 1941), 18 Atl. 2d 210, 214.

violate the law and that they could be discontinued on receipt by appellee of the prescribed notice from law enforcing agencies.

It was certainly competent for the Federal Communications Commission to forbid the use of services subject to its plenary regulation to violate the law, and to prescribe the evidence necessary to warrant their discontinuance for such illegal use. It was equally competent for the parties to agree accordingly.

Appellant's situation, when informed of the receipt by appellee of the notices, was analogous to that of one who, being informed of circumstances sufficient to put a prudent man on notice, fails to inquire—he could not, in good conscience, close his eyes to the official accusations and at the same time insist upon maintenance by appellee of the service at the risk of its being accused of violating the criminal laws of the state and the Tariff regulations.[5]

While the complaint alleges that appellant is engaged in "disseminating information of sporting events, including racing news" [R. 3], and that its customer, Consolidated Publishing Company of Los Angeles, is likewise engaged [R. 5], it does *not* allege that either appellant or its customer has been or is *exclusively* so engaged, nor does appellant, in the complaint or otherwise, challenge the truth of the statements made in the notices, or either of them.

The District Court was not, when it made the preliminary orders, informed, by anything in the record, of the Tariff regulations, or of appellant's application and contract, or of the notices from the law enforcing agencies,

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[5]See California Civil Code, Section 19;
2 Pom. Eq. Jur. (5th Ed.), pages 651, 653;
Fresno Canal etc Co. v. Rowell (1889), 80 Cal. 114, 117;
Wood v. Carpenter (1879), 101 U. S. 135, 141.

or of the proceedings before, or the decision by, the California Public Utilities Commission. These facts were fully disclosed at the hearing upon the order to show cause, and the orders directing restoration of the leased service and for injunction were thereupon vacated.

Appellant complains that the Attorney General's notice does not specify in what manner the Public Utilities Commission's hearing indicated that the leased wires were being used to aid bookmakers; that it "did not supply appellee with any facts indicating that appellant or its customer, Consolidated, was violating any law" (Op. Br. p. 9); also that the affidavit filed by appellee "does not set forth any facts to show that appellant or his customer, * * * was or is engaged in an illegal business, or was or is directly or indirectly violating any Federal or state law" (*id.*, p. 25);[6] and contends that neither the notices nor the Commission's decision have "any probative quality in this litigation" (Op. Br. p. 47); that "whether or not notice from a Federal or state law enforcement agency is a legal ground for termination of the facilities is of no moment" (*id.* p. 24); and that "there is no tariff question involved in this suit" (*id.* p. 26).

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[6]The affidavit referred to, after reciting receipt of the notice of March 4, 1948, from the Kern County officials that the leased facilities in Bakersfield "were being used to violate section 337a and section 182 of the Penal Code" and of notice from the Attorney General of March 31, 1948, that the leased facilities at each of the eight addresses specified (including the address of Consolidated Publishing Company) "were being used to furnish information to bookmakers in violation of section 337a of the Penal Code" [R. 30-31], and that discontinuance of service was "pursuant to and because of" said notices, and concludes, "All of the acts and conduct of defendant referred to in the complaint and in this affidavit have been pursuant to, in reliance upon, and in conformity with the established Tariffs * * * and in reliance upon the representations and demands of State law enforcement officers as herein stated" [R. 34].

In the light of the regulations, the contract, the notices, and the decision of the Public Utilities Commission, appellant's position exhibits obvious misapprehensions. He mistakenly assumes that the notice must, in order to warrant any attention, not only contain the essentials of an indictment, but must, in itself, be competent evidence of facts sufficient to constitute violation of the law, and that accusations by sworn officers of the state and findings by the state regulatory body that specific sections of the Penal Code are being violated by means of facilities under appellant's exclusive control are not sufficient to even require inquiry or response.

It is respectfully submitted that these contentions are inconsistent with the express provisions and obvious purpose of the regulations in appellee's Tariff No. 219, revised page 8, and with the plain language of appellant's contract.

Discussion about the jurisdiction of the Federal Communications Commission and the California Public Utilities Commission over the leased wire service is beside the point. It is, of course, the function of the state to suppress crimes against its laws. To warrant any assumption of national intent to interfere with the exercise of that function, even where the operation of a Federal law is involved, clear and unequivocal language to that effect is necessary. The rule was thus declared by Mr. Chief Justice Marshall in an early case:

> "To interfere with the penal laws of a State, where they are not levelled against the legitimate powers of the Union * * * is a very serious measure, which Congress cannot be supposed to adopt lightly, or inconsiderately."[7]

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[7]*Cohens v. Virginia* (1821), 6 Wheat. 264, 443.

The Federal Communications Act exhibits no such intention. The regulation in appellee's Tariff No. 219, revised page 8, filed with the Federal Communications Commission, which is reproduced in appellant's agreement, positively forbids use of leased private line telegraph facilities "for any purpose or in any manner directly or indirectly in violation of any * * * law," and authorizes discontinuance thereof on notice from law enforcing agencies that the facilities are being so used. This is tantamount to a declaration by the Federal Communications Commission that it will not "permit the declared policy of the States, * * * to be overthrown or disregarded by the agency of interstate commerce."[8]

If investigation by the Public Utilities Commission or any law enforcing agency of the state discloses violation of law, no one will contend that the discovery should be suppressed because the instrumentality involved is an interstate carrier.

Appellant's course, when informed of receipt by appellee of the respective notices and of appellee's intention to comply with the demands therein made, was clearly charted by decisions involving almost identical situations:[9] that is, to challenge the statements in the notices, if they were untrue, and then, if necessary, seek judicial protection against any asserted invasion of his rights.

Appellee's course was equally clear: under the regulations in its F. C. C. Tariff No. 219, revised page 8, and the express terms of its contract with appellant, it had no alternative but to discontinue the service.

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[8]*Lottery Case* (1903), 188 U. S. 321, 357.

[9]See *Fogarty v. Southern Bell Telephone & Telegraph Co.* (1940), 34 Fed. Supp. 251;
Hamilton v. Western Union Telegraph Co. (1940), 34 Fed. Supp. 928;
Tracy v. Southern Bell Telephone & Telegraph Co. (1940), 37 Fed. Supp. 829.

II.

Discontinuance of the Leased Telegraph Service Was Expressly Authorized by the Regulations in Appellee's Tariff No. 219, Revised Page 8, Filed With the Federal Communications Commission.

Appellee's Tariff No. 219, revised page 8, filed with the Federal Communications Commission, provides:

> "Facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states through which the circuits pass or the equipment is located, and the telegraph company reserves the right to discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that the service is being supplied contrary to law" [R. 25].

The regulation is clear and specific; it was repeated in appellant's application for service; both are pleaded in the answer [R. 41, 43], along with allegations that the application was accepted and the service furnished pursuant thereto and to the Tariff regulations, and was discontinued in obedience to the regulations and as authorized by the contract, after notices by law enforcing agencies that the service was being used to violate the state laws [R. 46-49, 50]. The discontinuance was not, however, until after appellant had been informed of the notices and had left unchallenged the truth of the statements made therein.

Notwithstanding these unquestioned facts, appellant says (Op. Br. p. 24) that "The issue presented by the pleadings is simply whether or not Appellant is entitled to the private wire facilities * * * which he has heretofore had

in use." It is respectfully submitted, however, that this is not correct; that, on the contrary, the issue is: Was the discontinuance of service authorized by appellant's contract and the regulations? It has been heretofore shown that the discontinuance was authorized by the contract. It is respectfully submitted that appellee having received the notices prescribed by the regulation, it must follow both on principle, and under the regulation, that the discontinuance was not only authorized, but required, by the regulations.

In a Maryland case, where leased wire telegraph service had been discontinued on warning from a United States Attorney that it was being used in violation of law, the telegraph company successfully relied upon the same F. C. C. Tariff 219, page 8, before its revision by addition of the clause expressly authorizing discontinuance upon receipt of the prescribed notice from law enforcing agencies. The subscriber first complained to the Maryland Public Service Commission; the complaint was dismissed. He then complained to the state court, which ordered the Commission to show cause why its action should not be vacated. After hearing, the Supreme Court of Maryland said:

> "But it is well settled that a telegraph company has the right to refuse service which is connected with illegal operations. The company may refuse to render such service, not only where such action would subject it to prosecution as a participant in the illegality, but also where it would have the effect of promoting illegality, even though the company might not be liable to punishment for rendering the service. * * * Otherwise, telegraph companies would be converted into public vehicles for the consummation of all kinds of illegal designs. * * *

"* * * no court should lend its aid to enforce a contract to do an act that is illegal, or which is inconsistent with sound morals or public policy, or which tends to corrupt or contaminate by improper influences the integrity of our social or political institutions * * * The State, in the exercise of the police power and in the interest of the public welfare, has the undoubted right to regulate and limit the right of contract."

Howard Sports Daily v. Weller (Md., 1941), 18 Atl. 2d 210, 214.

Similarly, in *Hamilton v. Western Union Telegraph Co.,* decided in 1940 (34 Fed. Supp. 928), the telegraph company justified threatened discontinuance of service under said Tariff No. 219, page 8, after warning by a United States Attorney that if the services were continued the company "would be held to account for knowingly aiding, abetting, and conspiring in the violation of state and federal laws." The court said (p. 929):

"The tariffs published by the defendant contain a provision preventing lessees of its wires from using its service to violate, directly or indirectly, any federal or state law. Even without such provision in the tariffs, the defendant would not only be authorized, it would be obligated, to discontinue service which contributes to and facilitates the operation of a business or enterprise in violation of law. Any person or company that knowingly assists in a scheme to violate the law is subject to prosecution. A court of

equity will not restrain the discontinuance of service by a utility if the character of the use of the service is such as to justify an honest doubt as to its legality. The service which a person has the right to demand of a public utility is service lawful in character." (Italics added.)

See, also:

Tracy v. Southern Bell Telephone & Telegraph Co. (U. S. D. C., So. Dist. of Fla., 1940), 37 Fed. Supp. 829;

Hagerty v. Southern Bell Telephone & Telegraph Co. (Fla., 1940), 199 So. 570;

People ex rel Hiegel v. New York Telephone Co. (1922), 195 N. Y. Supp. 332;

People ex rel Restmeyer v. New York Telephone Co. (1916), 159 N. Y. Supp. 369, 370;

Rulings by state regulatory bodies are to the same effect:

Partnoy v. Southwestern Bell Telephone Co. (Mo., 1947), 70 P. U. R., N. S. 134, 144-145;

Slapkowski v. New Jersey Bell Telephone Co. (N. J., 1947), 67 P. U. R., N. S. 33, 34;

Carrozza v. New England Telephone & Telegraph Co. (Mass., 1945), 61 P. U. R., N. S. 249, 250, 252-253;

Ganek v. New Jersey Bell Telephone Co. (N. J., 1944), 57 P. U. R., N. S. 146, 148-149;

Re Michigan Bell Telephone Co. (Mich., 1940), 34 P. U. R., N. S. 65.

The case of *People v. Brophy* (49 Cal. App. 2d 15), relied upon by appellant, involved no regulatory or contractual provisions such as are here presented, and has no application to this case. The court there held that an order by the Attorney General requiring discontinuance of telephone service because the subscribers were "furnishing information to bookmaking establishments throughout the State through the use of telephonic equipment furnished by your company," *was unauthorized* by either law or regulation, and was no defense to an action to restrain such discontinuance; that it amounted to no more than a recital of information which the telephone company had received, and its source.

Likewise, neither *Pennsylvania Publications, Inc. v. Pennsylvania Pub. U. Com'n* (Pa., 1944), 36 Atl. 2d 777; *Giordullo v. Cincinnati & Suburban Bell Telephone Co.* (Ohio, 1946), 71 N. E. 2d 858; *Shillitani v. Valentine* (N. Y., 1947), 71 N. E. 2d 450, nor *Salter v. New York Telephone Co.* (N. Y., 1946), 67 N. Y. S. 2d 396, cited by appellant, involved any public utility regulation authorizing discontinuance of service on receipt of notice from law enforcing agencies that it is being used to violate the law. They, therefore, have no application here.

In this case, the Tariff regulation, having the force and effect of law, specifically forbids use of leased wire facilities to, for any purpose or in any manner, directly or indirectly violate the law, and authorizes discontinuance of the ser-

vice on receipt of notice from law enforcing agencies that the facilities are being so used.[10]

Assuming, as appellant claims, that "distribution of racing news does not directly or indirectly violate any federal or state law," it is undeniable that bookmaking is condemned by section 337a of the California Penal Code and that aiding and abetting bookmaking is an offense under section 659 of the same code. The notices warned appellee that its facilities at the places specified were being "used to aid, assist and carry on the business of illegal bookmaking" in violation of section 337a of the Penal Code of California [R. 72], and "are engaged in furnishing information to bookmakers in violation of section 337a of the Penal Code" of California [R. 74]. The statements made in the notices were unchallenged.

Under the circumstances, failure by appellee to discontinue the service would have been at the risk of being charged with permitting the continued use of its facilities to aid and abet bookmaking, contrary to its Tariff regulations and in violation of state law.

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[10]As shown by the record herein, the California Public Utilities Commission has, since the decision in the *Brophy* case, ordered that public utility service *must* be discontinued whenever the utility "has reasonable cause to believe that the use made or to be made of the service, or the furnishing of service to the premises of the applicant or subscriber, is prohibited under any law, ordinance, regulation or other legal requirement, or is being used, or is to be used, as an instrumentality directly or indirectly to violate or aid and abet the violation of the law," and that written notice from any law enforcement officer stating "that such service is being used or will be used as an instrumentality to violate, or to aid and abet the violation of, the law, is sufficient to constitute such reasonable cause." The order also requires that each contract for communication service contain the provisions of this decision [R. 70-71].

The regulations are not, as appellee assumes, "convenient apologetics" (Op. Br. p. 40), but are to enable the utility to avoid the risk of becoming involved in aiding and abetting violation of law by heeding and acting upon the warnings of sworn public officials.

Their purpose is quite analogous to that of statutes requiring termination of leases because of the use of leased premises for illegal purposes—such as dispensing liquor or prostitution. It has long been recognized that statutes of the latter sort are to enable lessors to protect themselves against prosecution for allowing unlawful activities by authorizing them to dispossess a transgressing tenant immediately upon discovery of the wrong doing.[11]

If appellant had, responsive to warning that appellee had received the notices, challenged the truth of the statements in the notices, or, admitting the fact, had stated that the illegal activities were without his knowledge and had been stopped, a different situation might have been presented. The notices were unchallenged; obedience to the Tariff regulations was imperative.

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[11]32 Am. Jur., Sec. 864, page 731;
2 Tiffany on Landlord and Tenant, page 1754;
People ex rel. Jay v. Bennett (1878), 14 Hun, N. Y. 63;
McGarvey v. Puckett (1875), 27 Ohio St. 669;
Trask v. Wheeler (1863), 89 Mass. 109.
See, also, *Mammoth Oil Co. v. United States* (1927), 275 U. S. 13, 27.

III.

Appellant's Recourse Is to the Federal Communications Commission, and Not to the Courts.

Appellee's answer denies [R. 46] that the discontinuance of service was wrongful, arbitrary, or without just cause; the court found accordingly [R. 87, 88]. There is no claim that Tariff No. 219, revised page 8, is either unreasonable or arbitrary.

The discontinuance of service having been in strict accord with the Tariff, any claim that the discontinuance was arbitrary or unreasonable must be attributed to the regulation, not to the telegraph company. So long as the regulation stands, neither appellee nor any one else can disregard or violate it, and no court can authorize or direct its violation.

For complaint, therefore, that the regulation is arbitrary or unreasonable, the exclusive remedy is by application to the Commission to change it.

> "It is urged * * * that the regulation in question is unlawful because it is unreasonable * * * But we agree with the District Court that where the claim of unlawfulness of a regulation is grounded in lack of reasonableness, the objection must be addressed to the Commission and not as an original matter brought to the court. We think that the Act confers jurisdiction upon the Commission to hear appellants' grievances against the substance of this regulation."
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> *Ambassador, Inc. v. United States* (1945), 325 U. S. 317, 324;
>
> *Baltimore & Ohio R. R. Co. v. Pitcairn Coal Co.* (1910), 215 U. S. 481, 492-4;
>
> *Ten Ten Lincoln Place v. Consolidated Edison Co.* (1947), 73 N. Y. S. 2d 2, 7.

IV.

Neither Section 401 nor Section 406 of the Federal Communications Act Is Applicable to This Case.

Sections 401[12] and 406[13] of the Federal Communications Act neither contemplate nor authorize resort to the courts to coerce or otherwise compel violation of regulations of the Federal Communications Commission.

Section 401 of the Act vests district Courts with jurisdiction *upon application of the Attorney General, at the request of the Commission,* alleging failure to comply with or the violation of any provision of the Act, to issue writ of mandamus compelling compliance.

Obviously, no such situation is here presented.

Section 406 vests such courts with jurisdiction

> "upon the relation of any person alleging any violation, by a carrier subject to this chapter, or any of the provisions of this chapter which prevent the relator from receiving service * * * from said carrier at the same charges, or upon terms or conditions as favorable as those given by said carrier for like communication or transmission under similar conditions to any other person, to issue * * * writs of mandamus."

There is no claim or allegation, either "on relation of any person," or otherwise, that appellant, or any one else, is being prevented "from receiving services * * * at

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[12]U. S. Code, Title 47, 1948 pocket part, p. 81.

[13]*Idem.*, p. 99.

the same charges, or upon terms * * * as favorable as those given by" appellee to any other person.

Chapter 5 declares the purpose of the Act to be the regulation of communication by wire and radio so as to make such service available on equal terms to all (section 151); it requires the furnishing of service upon request "in accordance with the orders of the Commission," authorizes the Commission to prescribe regulations, which must be reasonable (section 201), and forbids furnishing facilities otherwise than as therein specified (section 203). It also authorizes investigations by the Commission as to *whether any rate or regulation is discriminatory, unreasonable or otherwise contrary to the Act,* and to make such orders as may be appropriate with reference thereto (sections 205, 208).

F. C. C. Tariff No. 219, revised page 8, forbids any use of telegraph facilities to directly or indirectly violate or aid or abet the violation of any law, and authorizes discontinuance of service on notice from law enforcing agencies that it is being so used. The Tariff is, of course, binding upon the carrier, its customers, and the courts.

Section 406 authorizes resort to the courts only where the utility refuses or fails to perform a duty so plain as not to require action by the regulatory authority. It is practically identical with section 23 of the Interstate Commerce Act. Construing the latter section, the Supreme Court has said:

> "* * * the remedy afforded by that section * * * must be limited either to the performance

> of duties which are so plain and *so independent of previous administrative action of the commission* as not to require a prerequisite exertion of power by that body, or to compelling the performance of duties which plainly arise from the obligatory force which the statute attaches to orders of the commission, rendered within the lawful scope of its authority, until such orders are set aside by the commission or enjoined by the courts." (Italics added.)
>
> *Baltimore & Ohio R. R. Co. v. Pitcairn Coal Co.*, (1910), 215 U. S. 481, 499.

Obviously, in the face of the regulation and the conditions confronting the telegraph company on April 2, 1948, the latter's duty to continue the leased wire service was not plain and "independent of previous administrative action of the commission," nor did such duty arise "from the obligatory force which the statute attaches to" any order of the commission—quite the contrary.

If, as appellant apparently contends, the regulation authorizing discontinuance of telegraph service on notice from state law enforcing agencies that it is being used to violate or to aid and abet in the violation of state laws is arbitrary or unreasonable, his complaint should have been to the Federal Communications Commission to change the regulation—not to the District Court to compel violation of the regulation.

V.

The Orders Appealed From Should Be Affirmed.

The discontinuance of service having been as authorized by the Tariff regulations and the contract between appellant and appellee, the orders appealed from are correct, and should be affirmed.

Respectfully submitted,

LAWLER, FELIX & HALL,

By Oscar Lawler,

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